3/28/90

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Finard-Zamias Associates by C. Daniel Hershenson, Esq.
P.O. Box 909
Norwich, VT 05055

Memorandum of Decision
Land Use Permit
#1R0661-EB

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This decision pertains to various preliminary motions in the above matter. As is explained below, the Environmental Board has decided to grant the motions to dismiss the appeal of the Vermont Natural Resources Council (VNRC) with respect to Criterion l(G) (conformance with wetland rules) and to deny the remainder of the motions to dismiss the appeals of VNRC and Citizens for Responsible Growth/Rutland (CRG). The Board also has decided that VNRC, CRG and the City of Rutland are parties to this appeal. Finally, the Board has decided to grant VNRC's and CRG's motions to stay the permit and to compel access to the property, to deny their motion to recess, and to revise the hearing schedule to allow investigation of the wetlands at issue.

I. BACKGROUND

The District #1 Environmental Commission issued Land Use Permit #1R0661 on November 8, 1989. The permit authorizes the construction of a 442,000 square foot shopping center with associated utilities, parking and landscaping on a 92-acre parcel, and a new wetland on a 15.35-acre parcel nearby. Both parcels are located off U.S. Route 7 *in* the *Town of* Rutland, Vermont. Finard-Zamias Associates (the Permittee) is the developer for this project. Edward Dyer, Jane Woods, and Paul Handy (the Co-permittees) are owners of the tracts on which the proposed project is to be located.

VNRC and CRG (collectively, the Appellants) filed a joint appeal of the permit on December 1, 1989. CRG appealed with respect to air pollution and fiscal impacts,

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under the following criteria of 10 V.S.A. § 6086(a): 1 (air pollution), 7 (municipal impacts), 9(A) (impact of growth), 9(H) (costs of scattered development), 9(J) (public utility services), and 9(K) (development affecting public investments).

VNRC appealed regarding impacts on wetlands, under the following criteria of 10 V.S.A. § 6086(a): 1 (water pollution), including specifically l(G) (conformance with wetland rules); 4 (soil erosion); 8 (rare or irreplaceable natural areas); and 10 (conformance with local or regional plans).

On December 13, 1989, the Appellants filed a motion for a discovery order to gain access to the property. On January 3, 1990, the Permittee filed a cross-appeal. On January 4, 1990, Environmental Board Chairman Stephen Reynes convened a prehearing conference in the Town of Rutland, Vermont. At the prehearing conference, the Permittee filed two motions to dismiss, one seeking dismissal of the CRG appeal, and the other seeking dismissal of the VNRC appeal.

On January 23, 1990, the Board issued a prehearing conference report and order, which set deadlines for filing preliminary motions and memoranda, including in part a requirement that petitions for party status be filed no later than February 5. On January 30, the Town of Rutland filed a motion to dismiss both appeals with a supporting memorandum. On January 31, the Permittee filed a withdrawal of its cross-appeal, and memoranda in support of its motions to dismiss. On February 1, 1990, the Appellants filed an opposition to the cross-appeal and the following motions with supporting memoranda: substituted motion for a discovery order to compel entry on lands, motion to stay site work, and motion to recess hearing.

On February 13 and 14, 1990, respectively, the Town and and the Permittee filed memoranda in response to the various motions filed by the Appellants on February 1. On February 15, the Town filed an additional memorandum of law. On that date, the Appellants filed a memorandum in opposition to the various motions to dismiss and a notice of objection to the Board's order requiring petitions for party status to be filed by February 5.

On February 21, 1990, the Board convened oral argument in Rutland, Vermont on the issues raised in the preliminary motions and memoranda. At the oral argument, the Town of Rutland filed a supplemental memorandum. The Appellants sought to introduce various documents issued by the Water Resources Board (WRB) concerning the adoption of the WRB's

wetland rules. The Town objected to the introduction of these documents.

On February 28, 1990, in response to questions from the Board at oral argument, the Appellants filed a letter stating that their proposed investigation of wetlands on the project tracts could begin after May 1 and that prefiled testimony on the issue of wetland impacts could be filed by May 14.

II. ISSUES

The issues before the Board are:

a. Whether to dismiss the appeals for the various reasons set forth in the motions to dismiss and supporting memoranda.

b. Whether the Board should vacate its order which required persons to submit petitions for party status by February 5 because the Appellants and the City of Rutland were parties before the District Commission and therefore are parties to this appeal.

c. Whether the Board should grant the Appellants' motions to stay, gain site access, and recess the proceedings.

The Board accepts the Permittee's withdrawal of the its cross-appeal as not contrary to the values embodied in Act 250 and therefore does not address the issues it raises.

III. DISCUSSION

A. Motions to Dismiss

VNRC and CRG filed a joint appeal, with each organization appealing on separate grounds. The Permittee and the Town of Rutland moved to dismiss these appeals for a variety of reasons. one of the challenges is common to both appeals; the rest relate only to one or the other of the appeals. To the extent that any challenges to the appeals which were raised in the motions to dismiss are not addressed below, such challenges are denied.

1. Common Challenae: Defective Notice of Anneal

Both the Permittee and the Town argue that the VNRC/CRG notice of appeal is procedurally defective. They state that

the notice only raises Act 250 criteria and issues, and does not challenge the District #1 Commission's findings or assign error to the District Commission's decision. They base their arguments on 10 V.S.A. § 6089(a), which requires a de novo hearing on all findings requested by a party, and on Board Rule 40(A), which states that notices of appeal shall assign reasons why the district commission decision was in error.

The Appellants respond that their appeal is sufficient to place other parties on notice of what is at issue in the proceeding. They also state that their appeal faults the District Commission for ignoring the evidentiary and factual issues which they raised before the District Commission, and that this is an allegation of error. Further, they argue that Vermont courts do not require "hypertechnical pleading."

The Board concludes that the appeals are not invalid for failure to challenge findings or assign error to the District Commission's decision. 10 V.S.A. § 6089(a) states that "[t]he Board shall hold a de novo hearing on all findings requested by any party." Board Rule 40 provides in pertinent part:

> (A) Any party aggrieved by an adverse determination by a district commission may appeal to the board and will be given a de novo hearing on findings, conclusions and permit conditions issued by the district commission. The appeal shall consist of the original and 10 copies of the appeal and of the decision of the commission; reasons assigned why the appellant believes the commission was in error, and issues the appellant claims are relevant shall be stated in the appeal. . . .
>
> (C) The scope of the appeal hearing shall be limited to those reasons assigned by the appellant why the commission was in error unless substantial inequity or injustice would result from such limitation. ...

The Board does not interpret 10 V.S.A. § 6089(a) to require that appellants specify, in their appeals, district commission findings which they challenge. That provision governs the nature of the hearing that the Board will give appellants who challenge district commission decisions by specifying that such a hearing will be de novo. It does not govern the content of notices of appeal.

Board Rule 40 does govern the content of appeal notices. Its purpose is to prompt appellants to focus their appeals and state the issues with reasonable specificity. The policy of the Board has always been to construe notices of appeal liberally.

The question of whether the Appellants' notice of appeal is specific enough is a close one, but on balance the Board believes that the notice as a whole meets the purpose of focusing the appeal and stating the issues. The Appellants have identified which of the Act 250 criteria are being appealed. With respect to the many of the criteria, the Appellants also have stated specific issues they seek the Board to address. Further, their notice states that the District Commission ignored the evidentiary and factual issues which they raised in the District Commission proceedings, to which the Permittee and the Town were parties and therefore should know what was presented.

The Board notes that its ruling does not suggest that appellants should disregard the requirements of Rule 40. The Appellants' notice of appeal was barely sufficient to meet the rule's requirements, and it was not as helpful to the process as it could have been.

2. Challenses to VNRC Appeal

a. Defective notice of appeal with respect to Criteria l(B) and 4

VNRC's appeal includes impacts on wetlands under Criteria 1, 4, 8, and 10. The Permittee argues that the appeal only states an "issue" that relates to Criterion 8, which is whether the wetlands are rare and irreplaceable natural areas. The Permittee asserts that, even if the Board finds the notice of appeal acceptable generally because the notice states what the issues are, it should still dismiss Criteria l(B) and 4 because no "issue" was specified by VNRC with respect to the criteria.

For the reasons given above that the notice of appeal generally is proper, the Board also concludes that the notice is proper with respect to the VNRC appeal of Criteria 1(B) and 4.

b. Vested right (Criterion l(G) (wetland rules))

VNRC raised Criterion l(G) in its appeal. Criterion 1(G) requires that projects subject to Act 250 jurisdiction not violate the rules of the Water Resources Board (WRB)

relating to significant wetlands. 10 V.S.A. § 6086(a)(l)(G).

To rule on this issue, the Board must take note of the relevant facts. Title 3, Section 810(4) of the Vermont Statutes allows the Board to take official notice, at any stage of the proceedings, of judicially cognizable facts. In re Handy, 144 Vt. 610, 612 (1984). Accordingly, the Board makes the following findings of fact, which it determines are judicially cognizable because they are matters of public record:

1. 10 V.S.A. § 905(9), authorizing the WRB to issue wetland rules, was effective on July 1, 1986.

2. For nearly three years after that date the WRB and the Agency of Natural Resources held extensive discussions and public meetings concerning regulating wetlands, and circulated various drafts of potential wetland rules.

3. The application for this project was filed with the District #1 Environmental Commission on October 21, 1988. Over a dozen hearings were held on the application, and substantial numbers of witnesses testified. The District Commission concluded that Criterion l(G) did not apply to this project.

4. Pursuant to the rulemaking process authorized in the Administrative Procedure Act, 3 V.S.A. § 836, the WRB filed wetland rules with the Interagency Committee on Administrative Rules (ICAR) on April 5, 1989. The WRB proposed the rules to the public on April 24, 1989. After holding public hearings around the state and soliciting and reviewing written comment, the WRB adopted the wetland rules on February 8, 1990. The rules became effective on February 23, 1990.

5. On February 22, 1990, the WRB filed a proposal with ICAR to amend the wetland rules to provide, in relevant part, that projects would be exempt from the rules if all necessary permits and approvals had been obtained for them by July 1, 1986.

The Permittee and the Town argue that the Permittee has a vested right to have this application reviewed under the law as it existed at the time the application was filed, October 21, 1988. The Permittee argues that since the wetland rules were not in effect at that time, they cannot be applied to this project. The Town argues that, because the wetland rules were not filed with ICAR until April 5,

1989, at the very least the wetland rules cannot be applied to permit applications filed before that date. The Town would, however, have the Board go further than the date the wetland rules were prefiled, and rule that Criterion 1(G) applies only to applications filed after February 23, 1990, the date the rules became effective.

The Appellants argue that Criterion l(G) applies to this project. They assert that Supreme Court case law supports the application of regulations which become effective between the date of the application and the date of the hearing on the application if one of two circumstances is met: (1) the applicant is on notice. of a pending change in the law which is not targeted at the applicant; or (2) the public interest in the regulations outweighs considerations of private interests, and the applicant has not made substantial improvements to its property in reliance on the regulatory system which existed at the time of the application. The Appellants state that the first circumstance is met because the Permittee has been on notice that wetland rules would be adopted since July 1, 1986, which is when the statute enabling the promulgation of the rules became effective. They also state that the second circumstance is met because the public interest in protecting wetlands outweighs any private interest, and the Permittee has not relied on the prior regulatory scheme.

The Board has concluded that Criterion l(G) need not be applied to this project. The Board believes that guidance on this issue is supplied by the Supreme Court in In re McCormick Manasement, 149 Vt. 585 (1988). In that case, the Supreme Court balanced what it termed "competing considerations" in determining whether a town zoning ordinance should apply to a project for which a subdivision plat was filed prior to enactment of the ordinance. The circumstances the Court balanced were the public's interest in applying regulations against the developer's reliance on the statutory scheme. The Court placed great emphasis on the town's interest in having proposed land uses be reviewed for conformance with the zoning ordinance. 149 Vt. at 588-89.

Similar to the town's strong interest in applying the zoning ordinance which the Court emphasized in McCormick, the state has a strong interest in regulating wetlands. In fact, the wetland rules are the result of a legislative determination that wetlands are highly significant and deserve protection. See 10 V.S.A. § 905(9). This determination deserves substantial weight.

However, the Board has decided (see below) that VNRC has filed a valid appeal under Criteria l(A), l(B), 4, 8, and 10 with respect to wetlands. The wetlands therefore will be reviewed by this Board under those criteria, and the goal of wetland protection will be accomplished. Further, the Board is concerned that there may be other equitable factors, such as the Permittee's reliance on the statutory scheme, which favor not applying the wetland rules to the project. Accordingly, the Board believes that Criterion l(G) need not be applied to this application in order for the Board to thoroughly review the impacts of this project on the wetlands. Were the other criteria not at issue in this case, the Board's decision might be different.1

c. Lack of party status below (Criteria l(G) and 10)

The Permittee and the Town argue that VNRC cannot appeal Criteria l(G) and 10 with respect to wetlands because it was not granted party status on these criteria by the District Commission. The Board's decision that Criterion l(G) does not apply to this application renders it unnecessary to rule on whether VNRC is barred from appealing that criterion for lack of party status before the District Commission.

The Appellants argue that the VNRC appeal on Criterion 10 cannot be challenged because it was granted party status on that criterion and this party status was not appealed by any party.

VNRC may appeal Criterion 10 because it had party status on the criterion before the District Commission. The Board has previously ruled that persons may appeal criteria if they have party status on the criteria as the district commission level. See Re: Sherman Hollow, #4C0422-5-EB, Memorandum of Decision at 4 (February 3, 1988). It is immaterial whether the District Commission couched its grant of party status in terms of fiscal impacts. Persons granted party status have it on the entire criterion or subcriterion and not on just a part.

1Because of the Board's ruling on Criterion l(G), this decision does not address the issue of whether to accept evidence offered by the Appellants at the February 21 oral argument (see Section I, pp. 2-3, above).

d. Applicability of Criteria l(B), 4 and 8 to wetlands

The Town argues that the Board should at least dismiss the appeal as it relates to the impacts on wetlands under Criteria l(B), 4, and 8 (rare and irreplaceable natural areas) because, in the Town's view, those criteria do not relate to wetlands. The Town supports this argument by noting that Criterion l(G) specifically addresses wetlands by requiring that projects not violate the wetland rules.

The Appellants argue that the issues the Town raises are not grounds for dismissal; instead, the Town's argument merely raises "issues of proof" regarding the project's effects on wetlands under the various criteria, and that such issues are for the Board to consider after it has heard and reviewed the evidence.

Notwithstanding the existence of Criterion l(G), the Board concludes that the Town's motion must be denied. Particular values of the wetlands that are addressed under the criteria may be affected. For example, under Criteria 1(B), 4, and 8 (rare and irreplaceable natural areas), evidence is relevant that: (1) project waste disposal might affect the wetlands because the project fails to meet applicable health and environmental conservation regulations regarding waste disposal, or because the project will involve the injection of waste materials or harmful or toxic substances into ground water or wells; (2) soil erosion or reduction in the capacity of the land to hold water caused by the project might affect the wetlands by creating a dangerous or unhealthy condition; and (3) the affected wetlands may be rare and irreplaceable natural areas on which the project will have an undue adverse effect. See 10 V.S.A. § 6086(a)(l)(B), (4), and (8). The Board intends these examples of relevant evidence to be illustrative rather than exhaustive.

e. Scope of VNRC appeal

The Board's rulings above result in a determination that VNRC's appeal will go forward on wetlands under Criteria l(B), 4, 8 (rare and irreplaceable natural areas), and 10. However, VNRC's wetlands appeal refers to all of Criterion 1. With respect to Criterion 1, VNRC had party status before the District Commission on Criteria l(A) (headwaters) and l(B). The Board has cited above its rule that one can appeal only criteria or subcriteria on which one had party status before the district commission.

Accordingly, VNRC's wetlands appeal will as a whole be limited to Criteria l(A), l(B), 4, 8 (rare and irreplaceable natural areas), and 10.

3. Challenues to CRG Anneal

a. Criterion 1 (air): failure to participate

The Town and the Permittee argue that the Board should dismiss the CRG air pollution appeal because CRG failed to participate on that criterion even though it was granted party status. They support this argument with the notion that one cannot raise on appeal what one did not raise below. They also assert that CRG was granted party status by the District Commission under Rule 14(B)(2) (materially assisting party) and that to maintain such status a party must actually participate.

The Appellants argue that CRG can appeal because it had party status on Criterion 1, and that the Permittee and the Town cannot challenge CRG's appeal on grounds of failure to participate because they did not appeal CRG's party status. They also assert that CRG had party status under Rule 14(B)(l) (person whose interest may be affected by the proposed project).

The Permittee and the Town fail to persuade a quorum of the Board that their motions should be granted. Board decisions must be made by a majority (five) of its members. 1 V.S.A. § 172. Only Members Gibb and Storrow vote in favor of the motions to dismiss. Chairman Reynes and Members Day, Lloyd, and Wagner vote against the motions. Accordingly, the motions fail, and CRG's appeal on Criterion 1 (air pollution) will proceed.2

b. Applicability of Criteria 7, 9(A), 9(H), 9(J) and 9(K) to fiscal competition with other retail centers

In its appeal, CRG states that the Board should look at fiscal impacts under Criteria 7, 9(A), 9(H), 9(J), and 9(K) which may be caused by the mall's competition with existing retail centers. The Town and the Permittee argue that the

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2Due to the conflict between the District Commission's Hearing Order #1 and the findings of fact issued with the permit, the Board declines to rule on whether CRG was granted party'status under Rule 14(B)(1) or (2).

criteria do not allow the Board to do that. They assert that the criteria are primarily government-oriented and do not protect private interests which may be affected.

The Board concludes CRG may appeal Criteria 7, 9(A), 9(H), 9(J), and 9(K) and may address in its appeal fiscal impacts on competing retail centers. The reasoning which applies here was cited above with regard to hearing evidence concerning wetlands under Criteria l(B), 4 and 8. For example, under Criterion 7, evidence is relevant that competition with other fiscal centers may affect the ability of a government to provide governmental services.

c. Appeal of "non-growth" issues

With regard to Criteria 7, 9(A), 9(J), and 9(K), the District Commission decision states that CRG was given party status "with regard to fiscal impacts. .." However, the District Commission's "Hearing Order #1" states that the grant was "with regard to fiscal impacts to area municipalities resulting from growth associated with the project." The Town argues that CRG is seeking to review non-growth impacts under these criteria by bringing up the fiscal competition issue. The Town asserts that, since CRG only had party status on these criteria with respect to growth, it cannot appeal non-growth issues.

For the same reasons that the Board believes VNRC's Criterion 10 appeal is proper, the Board concludes that CRG's appeal of Criteria 7, 9(A), 9(J), and 9(K) is not improper for raising "non-growth" issues.

d. Scope of CRG appeal

Based on the Board's decisions above, CRG's appeal will proceed with respect to air pollution under Criterion 1, and fiscal impacts under Criteria 7, 9(A), 9(H), 9(J), and 9(K).

B. Party Status

At the prehearing, three non-statutory parties stated that they wished to participate in this appeal: VNRC, CRG, and the City of Rutland. [3] The Board's prehearing

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3"Non-statutory" parties refer to those parties not automatically entitled to notice and party status in Act 250 proceedings, in contrast to towns and town planning commissions. See 10 V.S.A. §§ 6084, 6085.

conference report and order requested petitions for party status by February 5, 1990. None was filed. On February 15, the Appellants filed an objection to this part of the prehearing order.

One issue that was raised at the prehearing conference was whether parties have to re-establish their qualifications for party status de novo. This is the basis for the Appellants' objection to the prehearing order. The Appellants assert that under Supreme Court case law and prior Board decisions, the Board is only able to review party status determinations which are appealed, and if a person is granted party status by a district commission, that person has party status before the Board unless that status is appealed.

The practice before the Board has been that persons need to re-establish party status at the appellate level. However, Act 250 does not mandate this interpretation. See 10 V.S.A. § 6089(a).

Concerning party status on appeal, the Supreme Court has stated:

> A de novo proceeding contemplates those parties who had an interest in the original proceeding being allowed to appear and participate as proper parties at the second set of hearings.

In re Preseault, 130 Vt. 343, 348 (1972). In that case, the Supreme Court reversed an Environmental Board decision because the Board had denied party status to an adjoining property owner at the Board level who had been a participant before the district commission.

Substantial policy considerations weigh in favor of interpreting Act 250 to enable parties before district commissions to be parties before the Board. The appeals process would be streamlined because the current practice of re-establishing party status on appeal results, in many appeals, in significant expenditures of time and resources on the part of the Board and persons involved in appeals.

Accordingly, the Board interprets Act 250 and the Board Rules to provide that parties in district commission proceedings are automatically parties on appeal with respect to the same criteria concerning which the district commission granted them party status. District commission grants or denials of party status may be challenged by the filing of a valid appeal or cross-appeal by an aggrieved

party pursuant to Rule 40. Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 12-13 (December 22, 1988); Re: Swain Development Cornoration, #3W0445-2-EB, Memorandum of Decision at 4-7 (July 31, 1989). In this case, VNRC, CRG, and the City of Rutland wish to participate on appeal and were granted party status on various criteria by the District Commission. Their party status is not challenged by an aggrieved party through appeal or cross-appeal. Consequently, VNRC, CRG and the City of Rutland are parties to this appeal on the criteria concerning which the District Commission granted them party status, and the Board vacates that part of the prehearing order which required filing of petitions for party status by February 5.

C. Motions Submitted by the Appellants

1. Motion to stav site work

The Appellants ask the Board to stay the effect of the District Commission permit. They are concerned that work on the project would result in a permanent and irreversible effect on wetlands. They state that wetlands being affected by the project are hydrologically connected to environmentally significant wetlands.

The Permittee argues that the Appellants' request for a stay is defective because (1) the request was filed with the Board, and (2) stay requests must first be made to the district commission. The Permittee quotes what it alleges to be Board Rule'42 in support of its argument. The Permittee has not opposed the stay motion on any other ground, but states that it will take no action or engage in any activity on the site which may affect wetlands.

Rule 42 allows the Board to issue a stay, stating that the Board may consider impact on the values embodied in Act 250, hardship to the parties, and the public health, safety or general welfare. The current language of the rule requires that stay motions must be made in writing to the Board:

> Any party aggrieved by a final order of the board or a district commission may request a stay by written motion filed with the board identifying the order or portion thereof for which a stay is sought. ..
>
> In deciding whether to grant or deny a stay, the board may consider the hardship to parties, the impact, if any, on the values sought to be protected by Act 250,

> and any effect upon public health, safety, or general welfare....

(Emphasis added.) There is no mention of first requesting a stay from the the district commission.

The Board has decided that a stay of Land Use Permit #1R0661 should be issued. That permit authorizes construction which may imperil wetlands which are at issue in this appeal. The criteria which are on appeal here with respect to wetlands embody values which may be affected by the construction. These values include protection of headwaters, proper waste disposal, prevention of soil erosion or reduction in the capacity of the land to hold water, protection of rare and irreplaceable natural areas, and conformance with regional and town plans. See 10 V.S.A. § 6086(a)(l)(A) and (B), (4),(8), and (10). If allowed to go forward, such construction may have effects on the wetlands which cannot be reversed.

Further, the Permittee has alleged no hardship if a stay of the permit is issued. The Permittee has instead stated that it plans to engage in no activities which will affect the wetlands at issue. Without a stay, such a promise is unenforceable. In addition, the Permittee's promise would allow it to commence construction which it believes will not affect the wetlands. While the Permittee may in good faith believe that certain parts of the proposed project may constructed without effect on the wetlands, an incorrect judgment in this regard could have irreversible impacts on the wetlands.

2. Motion for access to wropertv

The Appellants ask the Board to compel the Permittee to allow their expert to go onto the site to investigate the wetlands. The Appellants state that they have been denied access and that investigation of the wetland is critical to their case. They assert that the Board has authority to order the Permittee to grant access pursuant to 10 V.S.A. § 6027(a) (which gives the Board the power to require the production of evidence), the Vermont Administrative Procedure Act, and Board Rule 14(B).

The Permittee argues that there is no authority for the Board to require the Permittee to provide site access to the Appellants. The Permittee also argues that, while it is denying access now, the Appellants were given access to the site during the District Commission proceedings and their expert did visit the site on March 3, 1989.

The Board concludes that it should order the Permittee to grant site access to VNRC for purposes of evaluating the wetlands at issue. The Board has determined that VNRC's appeal regarding wetlands under Criteria l(A), l(B), 4, 8, and 10 is valid. VNRC must therefore be allowed the opportunity to make a full investigation of the wetlands in order to prepare its case. In addition, since the Board will now be faced with deciding issues concerning the wetlands, the Board will need comprehensive and balanced information, from different perspectives, to make those decisions.

The Board believes it has authority to order the Permittee to grant access to the tracts on which the proposed project will be located. Administrative agencies have those powers granted to them by statute or which are implied "as may be needed for the agency to achieve the task assigned to it." In re DeCato Brothers, Inc., 149 Vt. 493, 495 (1988). The Board believes that the structure and purposes of Act 250 imply a power to compel an applicant to grant site access to a party to the Act 250 proceeding regarding its application. Act 250 is a regulatory statute which requires environmental review of proposed land uses. 10 V.S.A. §§ 6001(3) and (19), 6083(a)(2), 6086(a). Act 250 jurisdiction is defined in terms of acreage and tracts of land. 10 V.S.A. §§ 6001(3) and (19), 6081. Prior to issuing a permit for a proposed land use, the Board or district commission must find that the use will meet a number of environmental criteria, many of which relate to impacts on land, such as headwaters, soil erosion, and stream alteration. 10 V.S.A. § 6086(a). The statute requires that certain persons be parties to Act 250 proceedings, and enables the Board to issue rules allowing more persons to be parties, which the Board has done. 10 V.S.A. §§ 6084(a), 6085(c); Rule 14. The statute assigns burdens of proof to parties other than the applicant with respect to a number of criteria, including Criteria 7 and 8, which are on appeal here. 10 V.S.A § 6088(b). The statute also requires the applicant to grant site access to the Board, district commissions, or their agents. 10 V.S.A. § 6083(b). The statute further gives the Board and district commissions the power to compel the production of evidence. 10 V.S.A. § 6027(a).

It is clear that the entire structure of Act 250 implicitly grants the Board and district commissions the power to compel an applicant to grant site access to parties. To evaluate land uses and impacts on land, it is necessary to obtain information concerning the land on which a project is proposed to be built. The Board's and district

commissions' primary means for obtaining such information is through the parties to an Act 250 proceeding. Further, to satisfy their burdens of proof regarding the impact of proposed land uses, parties must be afforded site access. This necessity extends not only to criteria concerning which the burden of proof is on opponents, but also to other criteria on which the burden is on the applicant, because otherwise granting party status would not be meaningful.

Accordingly, the Board will order the Permittee and Co-permittees to grant access to the project site to VNRC for the purpose of investigating the potential effects of the proposed project on wetlands. Reasonable notice must be given to the Permittee and Co-permittees concerning entry onto the property for this purpose. The Permittee and Co-permittees are cautioned that failure to comply with this order, or to allow VNRC to undertake a complete site investigation with respect to impacts on wetlands, may result in recess of this matter until such failure is corrected or a denial of the permit if the Board does not have sufficient information on which to base positive findings.

3. Motion to recess hearinas

There are two grounds for this motion. First, the Appellants are requesting that the hearings be recessed until the federal Army Corps of Engineers issues a decision concerning the wetlands at issue. The Appellants assert that the Corps will find that an "individual" permit is required for the site, and that such a permit will be denied. Second, the Appellants seek a recess of the proceeding in order to enable them to conduct wetland investigation and analysis once the ground has thawed.

Both the Permittee and the Town contest this motion. They argue that the Appellants are asking the Board to recess for an indefinite time and that an indefinite recess is not authorized by Act 250 or the Board Rules. They also argue that there is no authority in the Board Rules to recess pending issuance of a federal permit. They state as well that the federal permit might not be denied. Further, they assert that the Appellants have already had an opportunity to investigate the site.

Board Rule 13 allows the Board to recess "for a reasonable period of time" pending a number of events, including "conduct of investigations" or "other similar reason." Rule 19(C) allows the Board to recess and defer taking evidence until necessary permits or certifications are issued.

The Board has decided not to recess this matter. The Board does not believe that it is appropriate to recess this particular appeal pending issuance of the federal Corps permit. Further, the Appellants have stated that conditions at the wetland will be amenable to investigation after May 1, 1990 and that prefiled testimony can be filed within ten days of that date. Accordingly, the Board will revise the requirements of the prehearing order to allow the wetland investigation to occur without recessing the hearings (see attached order).

V. ORDER

1. The Permittee's and the Town's motions to dismiss with respect to Criterion l(G) are granted.

2. The remainder of the Permittee's and the Town's motions to dismiss is denied.

3. The scope of this appeal is as follows: wetlands - Criteria l(A), l(B), 4, 8 (rare and irreplaceable natural areas), and 10; air pollution - Criterion 1; and fiscal impacts - Criteria 7, 9(A), 9(H), 9(J), and 9(K).

4. The Appellants' objection to the prehearing report is granted. Paragraph 3 of the prehearing order dated January 23, 1990 is vacated.

5. VNRC is a party to this appeal with respect to Criteria l(A), l(B), 4, 8 (rare and irreplaceable natural areas) and 10.

6. CRG is a party to this appeal with respect to Criteria 7, 9(A), 9(H), 9(J), and 9(K).

7. The City is a party to this appeal with respect to Criteria l(B), 7, 8 (rare and irreplaceable natural areas), 9(A), 9(H), 9(K), and 10.

8. The Appellants' motion for a stay is granted. Land Use Permit #1R0661 is stayed pending the outcome of this appeal.

9. The Appellants' motion to compel access to the property is granted. The Permittee and Co-permittees shall provide access to the tracts of land on which the proposed project is to be located to VNRC. Such access shall be granted consistent with the specifications in the Board's decision, above.

10. The Appellants' motion to recess is denied.

11. Paragraphs 6, 7, and 8 of the prehearing order are vacated.

12. On or before April 17, 1990, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present for their direct case with respect to Criteria 1 (air pollution), 7, 9(A), 9(H), 9(J), and 9(K).

13. On or before May 2, 1990, parties shall file prefiled testimony for all witnesses they intend to present in rebuttal with respect to Criteria 1 (air pollution), 7, 9(A), 9(H), 9(J), and 9(K).

14. On or before May 15, 1990, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present for their direct case with respect to Criteria l(A), l(B), 4, 8 (rare and irreplaceable natural areas), and 10.

15. Paragraph 9 of the prehearing order is modified as follows with respect to the order of presentation, and except for this modification remains in force:

The order of presentation at the hearings will be: (1) on May 9 and 10, a brief overview by the Permittee, a site visit, and evidence on air pollution (Criteria 1) and fiscal impacts (Criteria 7, 9(A), 9(H), 9(J), and 9(K)); and (2) on May 23 and 24, evidence on wetlands (Criteria l(A), l(B), 4, 8 (rare and irreplaceable natural areas), and 10). Prior to considering wetlands on May 23 and 24, any items which were assigned to May 9 and 10 and were not completed will be heard.

Presentations on the air pollution, fiscal impacts, and wetlands issues will be as follows: the Permittee, the Appellants, the Town, and the City. Each party will call all its witnesses and introduce all its testimony during its presentation. Because prefiled rebuttal testimony is not being required for the wetlands issues, parties must rebut the prefiled testimony concerning wetlands during their assigned time for presentation. If evidence not previously made known is admitted or elicited following a party's presentation, that party may seek to introduce such rebuttal evidence as is not already in the record.

16. Except as modified by this order, the prehearing order remains in effect.

Dated at Montpelier, Vermont, this 28th day of March, 1990.

ENVIRONMENTAL BOARD

Stephen Reynes, Chairman
Rebecca Day
Arthur Gibb
Samuel Lloyd
Charles Storrow
W. Philip Wagner